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In The

Supreme Court of the United States

October Term, 1984

HENRY B. FITZPATRICK, JR.,

Petitioner,

vs.

I. V. DiMARTINO, A.J.S.C. AND THE SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The district court did not err in assuming jurisdiction herein since the New Jersey Supreme Court's denial of petitioner's motion for leave to appeal an interlocutory order was not a final determination of the merits of petitioner's claim; and the federal courts have jurisdiction to hear generalized constitutional challenges to rules promulgated by the New Jersey courts.

In their reply, respondents have alleged that the district court erred in assuming jurisdiction inasmuch as petitioner's challenge

"is to a state trial judge's action (unaltered on appeal to the highest state court) in denying his motion for *pro hac vice* admission." (Respondent's Brief, page 12).

In support of this contention, respondents cite *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), as dispositive of this jurisdictional question. In *Feldman,* bar applicants, Feldman and Hickey, sought declaratory and injunctive relief which would have compelled their admission to the District of Columbia bar or allowed them to sit for the examination, despite their failure to fulfill the requirement of graduation from a law school accredited by the American Bar Association as prescribed by Rule 46 I(b)(3) promulgated by the District of Columbia Court of Appeals. Respondent Feldman stated in his claim that "defendant's refusal to consider [his] individual qualifications to practice law is unlawful in view of his demonstrated fitness and competence, as well as the prior admission to the District of Columbia bar of several individuals who did not attend an accredited law school." *Id.* at 1307. Feldman sought a "declaration that defendant's actions have violated the Fifth Amendment to the Constitution and the Sherman Act, and . . . an injunction requiring defendants either to grant [him] immediate admission to the District of Columbia bar or to permit him to sit for the bar examination." *Id.*

Respondent Hickey's complaint was framed in much the same way, except that Hickey simply sought an order requiring defendants to allow him to sit for the bar examination at the earliest possible date. *Id.* at 1310.

In *Feldman*, this Court bifurcated its jurisdictional analysis since a close reading of the complaint disclosed that the petitioners had mounted a general challenge to the constitutionality of the rule *and* sought review of the District of Columbia Court of Appeals' decision in their particular cases. In the former claim,

petitioners asserted that the rule adopted by the District of Columbia Court of Appeals, which required proof of graduation from a law school accredited by the American Bar Association as a prerequisite for sitting for the bar examination, was unconstitutional because "it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals' power to regulate the bar to the American Bar Association." *Id.* at 1317. This Court held that the district court had subject matter jurisdiction over these elements of petitioners' complaint because a resolution of this issue would not require a review of a judicial decision in a particular case.

In analyzing the second claim proffered by Feldman and Hickey, the Court initially discussed whether the District of Columbia Court of Appeals had acted judicially when it refused to waive the requirement of graduation from a law school accredited by the American Bar Association. This was the crux of the jurisdictional issue. If the decision was a judicial one, then, pursuant to 28 U.S.C. §1257, the decision would constitute a final judgment of a state court. In that event, review thereof could be had only in the United States Supreme Court.

In deciding this issue, this Court recognized that the nature of a proceeding " 'depends not upon the character of the body but upon the character of the proceedings.' " *Feldman*, 460 U.S. at 1312, quoting *Prentis v. Atlantic Coastline*, 211 U.S. 210 (1908). Further, the Court noted that a judicial inquiry " 'investigates, declares and enforces liabilities as they stand on present or past facts' "; and that a nonjudicial inquiry is more legislative in nature and " 'looks to the future and changes existing conditions by making a new Rule to be applied thereafter to all or some part of those subject to its power.' " *Id.*

Therefore, with *Prentis* as precedent, this Court analyzed the proceedings in the District of Columbia Court of Appeals to determine whether they were judicial in nature and thus, appealable only to the United States Supreme Court. In his petition, Feldman contended that he possessed "the requisite fitness and good moral character necessary to practice law in this jurisdiction." *Id.* at 1313. In support of his position, he described in detail his legal training and experience. He asserted that his professional education and training were "equal to that received by those who had attended an ABA approved law school." *Id.* In essence, Feldman argued on policy grounds that the rule should not be applied to him because he had fulfilled the spirit, if not the letter, of that requirement. *Id.* The Court concluded that the proceedings in the District of Columbia Court of Appeals were judicial in nature because that court was required to determine "in light of existing law and in light of Feldman's qualifications and arguments whether Feldman's petition should be granted." *Id.* at 1314. Thus, to that extent the district court lacked subject matter jurisdiction over that element of the complaint.

In the instant case, it is clear that the *Feldman* decision in no way supports respondents' position that the district court lacks subject matter jurisdiction over petitioner's claim. Most fundamentally, *Feldman* stands for the proposition that the United States district courts may not assume jurisdiction over final judgments rendered by a state's highest court in a judicial proceeding. Petitioner does not contest this fundamental proposition. Rather, in the present case, pursuant to 28 U.S.C. §1343(a)(3), the United States District Court of New Jersey properly exercised original jurisdiction over petitioner's claim that the respondents' refusal to permit his admission *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constitutes a violation of his constitutional rights. Petitioner was not seeking review of a decision rendered by the New Jersey Supreme Court. Indeed, the New Jersey Supreme Court refused to allow petitioner

to appeal an interlocutory order of the Superior Court of New Jersey. This refusal by that court distinguishes this case from *Feldman*. Unlike *Feldman*, petitioner never had an opportunity to argue fact or policy before the New Jersey Supreme Court and that court never made a judicial (or any) determination of fact or policy. It refused to allow the appeal. Thus, initiating a civil suit in the United States District Court of New Jersey was the only redress available to petitioner to vindicate the abridgement of his constitutional rights.

Moreover, assuming *arguendo* that the New Jersey Supreme Court's refusal to grant petitioner's motion for leave to appeal an interlocutory order is, in fact, a final determination of petitioner's claim herein, *Feldman* still does not require this Court to hold that the district court had no subject matter jurisdiction in this case. In *Feldman*, this Court recognized that the state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. Such a practice is exactly what the Supreme Court of New Jersey has done in this instance. New Jersey Court Rules, 1969, R. 1:21-2 was promulgated to regulate the appearance of out-of-state counsel in court proceedings in New Jersey. It specifies that the court can exercise its discretion in allowing out-of-state attorneys to appear. However, no explicit guidelines are given to regulate this discretion. In the instant case, the Superior Court of New Jersey was relying on the rule as construed by *Burlington County Internal Medical Associates, P.A. v. American Medicorp. Inc.*, 168 N.J. Super. 382, 403 A.2d (1979) when it ruled that petitioner should not be allowed to appear in court. Petitioner has argued that this rule, as promulgated and enforced by the New Jersey courts, is *inherently* unconstitutional because the factors which the courts evaluate to determine whether out-of-state counsel should be permitted to appear in New Jersey courts have no correlation to the underlying end sought to be achieved by the rule. Petitioner was not asking the district court to evaluate the rule as the Superior Court of New Jersey applied it to him. Rather, petitioner sought that this rule be viewed out

of context to any particular application since the rule as it stands discriminates against *any* out-of-state attorney who wishes to represent a client in New Jersey. Therefore, in this instance, the district court was not required to review a judicial decision of the New Jersey Supreme Court.

This analysis is consistent with that employed by the Tenth Circuit in *Razatos v. Colorado Supreme Court*, 745 F.2d 1429 (10th Cir. 1984). In *Razatos*, the Colorado Supreme Court had adopted rules governing the procedures by which disciplinary proceedings may be brought against attorneys in Colorado. The rules established that when a charge is filed, a grievance committee should be empanelled which conducts a formal hearing during which witnesses are sworn, testimony taken and a complete record made. If the panel finds that the charges are proven, it recommends appropriate disciplinary action to the Colorado Supreme Court. The facts in *Razatos* established that a grievance was filed against Razatos, and that a committee was formed which held a hearing and recommended that Razatos be suspended from the practice of law. The Colorado Supreme Court adopted the panel's recommendation and suspended Razatos for three years. He appealed the court's decision to the United States Supreme Court, which denied the appeal. Thereafter, Razatos commenced a §1983 action in the United States District Court against the Colorado Supreme Court and its justices. The district court dismissed the claim for lack of subject matter jurisdiction and, alternatively, on the ground that the rule was not demonstrated to be constitutionally invalid.

In addressing the jurisdictional question, the United States Court of Appeals for the Tenth Circuit ruled that the district court did have jurisdiction to the extent that Razatos had claimed that the rule violated the due process clause of the Fourteenth Amendment to the Constitution. In order to evaluate that constitutional challenge, the court reasoned that the district court

need not review the decision of the Colorado Supreme Court. Rather, it need only look to the rule as promulgated by the court and as construed by state case law. The constitutional challenge in *Razatos* was framed in such a way as to uphold the exercise of subject matter jurisdiction by the district court.

Herein, petitioner framed his claim in a similar way. He does not question that New Jersey Rule R. 1:21-2 applies in this case and his claim does not assert any particular application of the rule. Rather, petitioner contests the inherent constitutional invalidity of criteria applied by the New Jersey courts to *pro hac vice* admissions. Accordingly, the district court properly exercised jurisdiction.

Similarly, in *Schwartz v. Judicial Retirement System of New Jersey*, 584 F. Supp. 711 (1984), plaintiff challenged the constitutional validity of a New Jersey statute and an administrative directive of the New Jersey Supreme Court, both of which prohibited retired state judges receiving pensions from engaging in certain forms of private law practice. Plaintiff, a retired judge of the New Jersey Superior Court, sought clarification from the Supreme Court of New Jersey as to the ethical propriety of accepting a position as county counsel. The Supreme Court of New Jersey advised plaintiff that such employment would be impermissible under the statute and rule.

Plaintiff filed an action in the United States District Court for the District of New Jersey asserting constitutional challenges to the statute and rule. The court considered whether the plaintiff's actions constituted an "impermissible attempt to 'appeal' a decision of the New Jersey Supreme Court to this Court." *Id.* at 715. After considering *Feldman* and *Prentis*, the court noted that "plaintiff's grounds for objection are inherent in the regulations, and do not turn on any particular application of them." *Id.* at 715, 716. The court held that it had jurisdiction

over plaintiff's claim and specifically distinguished the case where a plaintiff claims a rule is incorrectly applied to a particular case.

Clearly, in the present case, petitioner's constitutional claims do not turn on any "particular application" of the New Jersey rule. Rather, his claims are grounded in the "inherent" unconstitutionality of the rule itself. Thus, jurisdiction in the District Court of New Jersey was proper.

Finally, in *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983), *prob. juris. noted*, 104 S. Ct. 2149 (1984), it was again recognized that district courts have jurisdiction to hear generalized constitutional challenges to state bar rules. In *Piper*, an attorney who was a resident of Vermont, petitioned the New Hampshire Supreme Court for a dispensation from a rule promulgated by that court which requires that a bar applicant must "either [be] a resident of the State of New Hampshire or [have] filed a statement of intention to reside in the State of New Hampshire." The New Hampshire Supreme Court denied her petition. Subsequently, Piper filed a complaint in the United States District Court for the District of New Hampshire, claiming that the residency requirement for admission to the bar violated the privileges and immunities clause of the United States Constitution. The district court rendered a judgment in favor of Piper. On original submission, a divided panel of the Court of Appeals reversed the judgment. Upon granting a petition for rehearing *en banc*, the Court of Appeals vacated the panel's judgment. Upon *en banc* reconsideration, the Court of Appeals was divided 2-2. Therefore, the decision of the district court was affirmed by an equally divided vote.

It is important to note that one of the two *en banc* opinions recognized that the *Feldman* holding did not mandate dismissal of plaintiff's claim for lack of jurisdiction. The opinion states:.

> After oral argument was heard by the panel, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, ____ U.S. ____ 103 Supreme Court 1303, 75 L. Ed. 2d 206 (1983). Appellant has suggested to us that *Feldman* requires the dismissal of the instant case for lack of jurisdiction. We disagree. *Feldman* holds that a Federal District Court may not sit in review of a state court's application of a bar requirement to a particular individual's case. *Feldman* indicates, however, that Federal Courts have jurisdiction to hear generalized constitutional challenges to state bar rules. Piper's challenge is generalized. She does not question that Rule 42 applies in her case, but rather contends that such a residency requirement is unconstitutional in all cases.

Id. at 118 n.1. Herein, petitioner is making the same generalized claim. He contends that in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion, Rule R. 1:21-2 is unconstitutional since it violates the privileges and immunities clause of the United States Constitution.

Thus, since this Court has held in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), that challenges to the constitutionality of state bar rules do not necessarily require a United States district court to review a final state court judgment in a judicial proceeding, the United States District Court of New Jersey did not err in assuming subject matter jurisdiction herein. Such assumption of jurisdiction was proper since the proceedings giving rise to Rule R. 1:21-2 were non-judicial in nature and, therefore, the policies prohibiting United States district court review of final state court judgments are not implicated.

CONCLUSION

The United States District Court of New Jersey did not err in assuming jurisdiction herein. The Supreme Court of New Jersey did not render a final determination on the merits of petitioner's claim. Therefore, to that extent, the holding in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), is inapplicable. Further, to the extent that *Feldman* also holds that federal district courts do have subject matter jurisdiction over generalized constitutional challenges to state bar rules, the district court was correct in assuming jurisdiction herein since petitioner's claim is not to any particular application of Rule R. 1:21-2 to him. Rather, Rule R. 1:21-2 is inherently unconstitutional in that it violates the privileges and immunities clause of the United States.

Respectfully submitted,

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